

CARL KINNISON 1/7/2011

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRANK L. SNIDER, III,
PLAINTIFF,

vs. Case No. 1:10-CV-100

CITY OF CAPE GIRARDEAU, ET AL.,
DEFENDANTS.

DEPOSITION OF CARL KINNISON
TAKEN ON BEHALF OF THE PLAINTIFF

JANUARY 7, 2011

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6 (NO EXHIBITS MARKED)

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UNITED STATES DISTRICT COURT
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EASTERN DIVISION

FRANK L. SNIDER, III,

PLAINTIFF,

vs.

Case No. 1:10-CV-100

CITY OF CAPE GIRARDEAU, ET AL.,

DEFENDANTS.

DEPOSITION OF CARL KINNISON, produced, sworn
and examined on behalf of the Plaintiff, between the
hours of 11:15 and 12:15 at the offices of Spradling
& Spradling, 1838 Broadway, in the City of Cape
Girardeau, State of Missouri, on the 7th day of
January, 2011, before Linda DeBisschop, CCR and
Notary Public within and for the State of Missouri.

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1 A P P E A R A N C E S

2

3 FOR THE PLAINTIFF:

4 Mr. Grant R. Doty

5 ACLU of Eastern Missouri

6 454 Whittier Street

7 St. Louis, Missouri 63108

8 (314) 652-3114

9 grant@aclu-em.org

10 FOR THE DEFENDANTS:

11 Mr. A. M. Spradling, III

12 Spradling & Spradling

13 1838 Broadway

14 Cape Girardeau, Missouri 63702

15 (573) 335-8525

16 spradlaw@swbell.net

17 Also present: Michael Hill, ACLU

18 Officer Matthew Peters

19

20 ALSO PRESENT:

21 Linda DeBisschop, CSR

22 Midwest Litigation Services

23 711 North Eleventh Street

24 St. Louis, Missouri 63101

25 314-644-2191

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1 IT IS HEREBY STIPULATED AND AGREED by and between
2 counsel for Plaintiff and counsel for the Defendant
3 that this deposition may be taken in shorthand by
4 Linda DeBisschop, CSR and Notary Public, and
5 afterwards transcribed into typewriting, and the
6 signature of the witness is waived

7
8 *****

9
10 CARL KINNISON,
11 of lawful age, being produced, sworn and examined on
12 behalf of the Plaintiff, deposes and says:

13
14 EXAMINATION

15 QUESTIONS BY MR. DOTY:

16 Q Could you give your name for the record?

17 A Carl Kinnison, K-I-N-N-I-S-O-N.

18 Q And your position?

19 A I'm the Chief of Police.

20 Q What I just handed you was the notice of the
21 deposition. Had you seen that before?

22 A Yes.

23 Q So we're here on a 30(b)(6) deposition for
24 Defendant, City of Cape Girardeau. There are topics
25 listed on this which we will inquire of the City of

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1 Cape Girardeau.

2 Have you been designated to give testimony
3 on behalf of the city on each of these topics?

4 A Yes.

5 Q Let's start with topic number one which is
6 the ordinance which the city enacted which bans the
7 desecration of the flag.

8 When did you first become familiar with
9 this or first gain knowledge of this ordinance?

10 A You know, I vaguely recall the ordinance.
11 You know, when this whole incident was brought to
12 light, had you asked me if the city had an ordinance
13 that reflected state law, I would have said I don't
14 think so, but let me check, so it's not something
15 that I consciously knew existed at the time until
16 recently.

17 Q I should have done with him as well. How
18 long have you been the Chief of Police?

19 A I've been the Chief for five years, a little
20 over five years.

21 Q Prior to that, were you a police officer in
22 the same department?

23 A Yes.

24 Q How long had you been there?

25 A Almost thirty-two.

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1 Q So as a police officer, you weren't aware of
2 it either?

3 A Well, like I said, when I looked at it, I
4 vaguely remembered it, but it wasn't one of those --
5 obviously, it is not one that we enforce often and
6 it is just not something that we see much of.

7 Q Do you know when it was first enacted?

8 A Only because I checked. It was 1984 and
9 this I'm getting from the city clerk. She did the
10 research on it and indicated that it was passed as a
11 result of several ordinances that was passed at that
12 time.

13 When a company came in to rewrite the city
14 ordinance manual, they did some research. They
15 included some state laws that were not included in
16 our city ordinances and kind of in one felt swoop at
17 that time the city council enacted a number of
18 ordinances and this was one of them.

19 Q And I know you got the information from the
20 clerk, but it didn't suggest it was their function
21 of someone downtown burning the flag and it's like,
22 oh, my gosh, we need to react to this?

23 A No. When I asked if there was any --
24 normally the way we do it now, there are council
25 letters that may suggest why a change and there was

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1 none of that. There was no discussion or no council
2 letters.

3 Q Thank you. How many times have people been
4 charged with the ordinance?

5 A I checked with our municipal court on that
6 and one time in 2004, August of 2004.

7 Q Do you know the disposition?

8 A The gentleman pled guilty and paid a fine.

9 Q Was he similarly charged with the state
10 statute?

11 A No. Could not find any information on the
12 state statute, any instances of charges as a result
13 of state. The only thing I had access to was the
14 city and there was just the one.

15 Q Do you know his name or can we get a hold of
16 that?

17 A I mean, I've got it somewhere here. Here it
18 is. The name is there on the top.

19 Q Were you surprised that the city had charged
20 someone?

21 A That there was one? I kind of was. I was
22 expecting zero, but it didn't really surprise me too
23 significantly that it was one. I would have been
24 surprised if there were 10 or 12 or more.

25 Q Is this something that -- are you aware of

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1 other flag desecration that happened that did not
2 result in a charge?

3 A I'm not.

4 Q And that's in all your time that you've been
5 there?

6 A It's just not something we run across much.

7 Q We're on topic two, which is the policies,
8 procedures, custom and practices of enforcement and
9 you really did answer part of it, that it has been
10 enforced once.

11 Is there an inclination that, if someone
12 violates something that's covered in both the
13 ordinance and the statute, Missouri statute, that do
14 you have a preference on which one that you would
15 charge under?

16 A Generally it would be the city ordinance.
17 The city ordinance is obviously covering misdemeanor
18 offenses and it typically works out most of the time
19 to our advantage to go through city court.

20 Now, if there are multiple offenses and
21 one is city and one is state, we go state. There
22 are those that we do that, but 95 percent of the
23 time, if it is a city ordinance violation compared
24 to a state law violation, we will go city.

25 Q I mean, you do get the fines from that?

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1 A The city general revenue fund, the municipal
2 court fines, I'm assuming, is what you are referring
3 to?

4 Q Yes.

5 A The city does get that, yes.

6 Q In the time that you've been in, has there
7 been ever a notice of articulating the existence of
8 this ordinance specifically to bring it to people's
9 attention? Bring it to the police officers'
10 attention? We have this ordinance out there?

11 A To my knowledge, no.

12 Q Since this incident happened, you heard
13 earlier when we talked with Officer Peters that
14 there has not been any articulation of
15 constitutional concerns about the statute and
16 ordinance. Is that correct, from your
17 understanding?

18 A Well, you know, first of all, like Officer
19 Peters mentioned, I think it is pretty clear that no
20 one is going to take any action right now without
21 prior approval and I've spoken with our city manager
22 about actually removing this from our city
23 ordinance. He's checking. He indicated that he
24 felt there was another case out there. I was
25 talking to Mr. Spradling about that this morning,

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1 but I'm still waiting to hear from him.

2 But personally, if it is unconstitutional
3 and non-existent, then we should remove it from the
4 city ordinance manual, so it's what we're working
5 toward doing. I'm kind of waiting to hear from him
6 before we make any official announcement.

7 Q I will talk about that, that's interesting
8 to know, but I understand again Officer Peters'
9 testimony was, when Fourth Amendment law changes or
10 there are updates, you are told in a memo or told in
11 a class. Is he correct that there has not been
12 anything that has come down from you in writing?

13 A Nothing in writing yet.

14 Q Has there been a class on it?

15 A No.

16 Q Would there be a benefit to that?

17 A Once I find out for sure from our city
18 attorney what the city's position is, then, yeah, we
19 will definitely put something out in writing and
20 indicate that the city ordinance is going to be
21 removed and, therefore, unenforceable and don't
22 enforce it, but we are still kind of waiting for
23 that to happen.

24 Q But is it unenforceable or not? You are
25 considering it enforceable now?

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1 A No. Obviously, Morley has made it to -- the
2 prosecuting attorney has indicated that he's not
3 going to file any additional charges as a result of
4 that so, like I said, there is a little bit of
5 confusion because I'm still working with our city
6 prosecutor to see about the city ordinance whether
7 he considers that constitutional or
8 unconstitutional, so we are still waiting for
9 confirmation from him.

10 Q I heard you say city prosecutor. Did you
11 mean city administrator because you talked about the
12 administrator earlier?

13 MR. SPRADLING: You probably meant
14 prosecutor.

15 Q (By Mr. Doty) City attorney?

16 A Yes.

17 Q So that is the one you are trying to see if
18 it is constitutional or not?

19 A As far as the ordinance goes and he was
20 doing some research and was supposed to get back.

21 Q And this is Mr. Swingle?

22 A No. This is Eric Cunningham, the city
23 attorney.

24 Q And Cunningham, how do you spell that?

25 A C-U-N-N-I-N-G-H-A-M.

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1 Q Now, he said he will not prosecute?

2 A Well, we are in a difficult situation with
3 prosecutors in the city. Our city attorney, who
4 handles all administrative legal issues, and then we
5 have a prosecuting attorney, who is his assistant.
6 He doesn't do any court prosecutions and that
7 position has been vacated and they have an interim
8 city prosecutor which they just announced, so we've
9 been working through two or three different
10 prosecutors over the last three months, so we are
11 kind of waiting to see who ends up in that
12 prosecuting position, but he has not indicated that
13 he would not prosecute.

14 Q I don't know the answer to this. You could
15 write a citation for the ordinance and it could be
16 prosecuted without any involvement of Mr. Swingle?

17 A Yes, in the city court.

18 Q In the city court?

19 A Yes.

20 Q And, although, there is some caution there
21 on your part and some recognition --

22 A Right.

23 Q -- that it is open ended, and so you are
24 considering it a good law?

25 A Well, I'm kind of like Officer Peters. I'm

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1 not sure I would consider it a good law, but I'm
2 waiting for advice from our city attorney before we
3 do anything official.

4 Q Have you told the officers in your
5 department that you have that view that it is a
6 questionable law and do not take any action
7 without --

8 A I have personally not told them that, no.

9 Q Do you know of anybody who has personally
10 told them?

11 A Not every single officer, but there is a
12 sense and we meet with the officers every morning
13 and everyone is aware of this case and knows that
14 this is an issue out there right now.

15 Q How many officers do you have?

16 A Seventy-four.

17 Q When did you first raise this issue with the
18 city attorney or administrator regarding -- was it
19 after the lawsuit was started?

20 A Yes. He received notice of it and then
21 actually he had sent me some information and I know
22 I just recently checked with him again earlier this
23 week because today was coming up and he was still
24 checking, but it's probably been three or four weeks
25 ago.

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1 Q Is your view and is the view of the
2 department that you are obligated to enforce laws on
3 the book that are unconstitutional?

4 A No, not if they had been declared
5 unconstitutional.

6 Q Did you know that burning the flag was
7 constitutionally protected?

8 A You know, when this kind of surfaced, I
9 vaguely remembered that that may have been a Supreme
10 Court case some time back years ago. You know, I
11 couldn't cite the case or I wouldn't have been for
12 sure but, obviously, the law was still on the books,
13 but I would have had to have done some research.

14 Q And it was '89 and in '89 you were a police
15 officer, not the chief?

16 A Right.

17 Q Were you the chief when this case was
18 prosecuted in 2004?

19 A No.

20 Q So this would not have been -- you weren't
21 the arresting officer, were you?

22 A No.

23 Q Did you remember this case when it came up?

24 A No.

25 Q I mean 74 is a pretty big number in terms of

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1 people and you might not interact with everyone?

2 A Right.

3 Q Let's move to topic three, which is
4 policies, procedures and practices with respect to
5 enforcement of the statute. Did you know the
6 statute existed?

7 A Yes.

8 Q Did you know it when you were the police
9 officer before being a chief?

10 A Yes.

11 Q Do you know if anybody has been arrested in
12 the city?

13 A That I do not know. You mean for the state
14 statute violation other than Mr. Snider?

15 Q Yes, except for Mr. Snider.

16 A That, I do not know.

17 Q Did you try to find out?

18 A I was going to. In all honesty, I was going
19 to and then the time slipped away. I was going to
20 call the prosecutor's office. I don't know if they
21 have the ability to --

22 Q Could you ask?

23 A I will.

24 Q I don't think there would be any questions
25 that are critical here that I would need to call you

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1 back, but if you could ask about that, that would be
2 useful for us.

3 A And I intended to do that.

4 Q Did you have any policies or procedures
5 written regarding this?

6 A No.

7 Q Just like the ordinance, nothing was --

8 A Right.

9 Q Do you recall someone ever talking about
10 flag burning?

11 A No.

12 Q Topic four is the policies, procedures,
13 customs and practices with respect to training and
14 supervising police officers regarding First
15 Amendment free speech rights.

16 Officer Peters said there's none. He
17 hasn't had any in his training at SEMO and he didn't
18 get any since he's been a police officer. You've,
19 obviously, been there longer. Do you recall any
20 First Amendment training?

21 A I remember the one thing that comes to mind
22 is an incident in St. Louis, you know, where St.
23 Louis County had arrested a guy for yelling in the
24 street using vulgar language and the Supreme Court
25 ruled that that was constitutional and I remember

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1 our department doing something back then putting out
2 a training tip or memo indicating that, you know,
3 look, just because someone is yelling doesn't mean
4 or vulgar language.

5 Because there was a time we had an
6 ordinance that prohibited vulgar language, so that I
7 remember, but that's about it. As far as training
8 goes and First Amendment issues, it's not something
9 that you see a lot of.

10 Q Do you remember when that was?

11 A I was afraid you were going to ask that.

12 Q Decade?

13 A You know what, it could be and, as I get
14 older, I end up having to multiply or factor by two
15 or three. I'm thinking it was in the '90s maybe.
16 That's just one that sticks out in my mind. There
17 could have been more in First Amendment issues. But
18 I remember that case because it changed the way we
19 actually did business as well. As far as someone
20 yelling and standing in the middle of the street
21 using course or vulgar language, you knew that that
22 was okay and that was constitutional protected.

23 Q Since you've been chief, any First Amendment
24 training?

25 A Specifically, I do not attend all of the

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1 legal training that our officers go to with the
2 different subject matter experts that provide that
3 training. Whether they touched on First Amendment
4 or not, I don't know.

5 Q You're not responsible for that training?

6 A We typically have -- the way Missouri is set
7 up with continuing education hours, we have POST
8 approved providers that come in. POST is the Police
9 Officers Standards and Training. They come in and
10 keep the course syllabus, objectives. If they do
11 any kind of testing, whether pre-testing or
12 post-testing and then they have subject matter
13 experts that teach the course. So we do not keep
14 any of those records and we have the certificates
15 that the officer attended, but the records are
16 maintained by the POST approved provider.

17 Q And that's P-O-S-T?

18 A Police Officer Standards and Training, which
19 is a department within the State of Missouri that
20 oversees police officer training.

21 Q So unless they covered the First Amendment,
22 it hasn't been covered?

23 A Right, yes.

24 Q You did mention the St. Louis County one,
25 which is specific. I mean, unless it came out as a

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1 training tip or a memo, are those written products
2 that you produce?

3 A They are.

4 Q Can we get them?

5 A I tried going back to see if I could find
6 those and we've got them documented since '04, so
7 that's about the best I could do is go back.

8 Q And you didn't find anything back to '04?

9 A You know, I knew that that was earlier than
10 that, so I didn't even look.

11 Q Your testimony is that there's not been
12 First Amendment training unless POST covered it?

13 A That I recall.

14 Q Do you know, if we contacted POST and said
15 give us what Cape Girardeau Police Officers have
16 been trained, they could produce the syllabus for us
17 or the subject? I guess, it really wouldn't be
18 useful to get a binder.

19 A See, they have different academies that are
20 POST approved providers. For example, at SEMO, the
21 SEMO Regional Law Enforcement Academy provides the
22 training. They would be the one that has the course
23 syllabus on it, so you would have to know who the
24 provider was. I don't think if you contacted POST,
25 that they would be able to say, yes, this is what

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1 Officer Peters or Officer Johnson received. We
2 would have to look through each individual officer
3 certificate and find out who the POST provider was
4 and then go to that POST provider. They are
5 mandated by law to keep those records for 50 years
6 or so.

7 Q But you could get these, right? These are
8 personnel records, I assume, and they would be
9 things that you would be able to get us?

10 A I would think so, yes. I think it is a
11 matter of just calling that POST provider and asking
12 for the information.

13 Q I asked Officer Peters regarding his
14 training at the Academy at SEMO. Of your 74
15 officers, I mean, do you have a general sense of
16 where they come from and where their training would
17 have occurred?

18 A You know, I would say probably half or a
19 little more than half has probably graduated from
20 the SEMO Academy.

21 Q And the other half?

22 A Well, there are academies all over the state
23 and, if they are veteran police officers, they can
24 take a POST test. If they had an equal amount of
25 training or greater amount of training in another

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1 state, they can pass the Missouri test so they would
2 have been trained in an academy in another state.

3 Q Where were you trained?

4 A I was here.

5 Q So you did SEMO just like Officer Peters?

6 A Actually, at that time it was the police
7 department was the state approved academy and that
8 was back in '79.

9 Q So SEMO Officer Peters said did not do First
10 Amendment training, so half of your officers are
11 coming to you without this First Amendment training?

12 A Yes. That's probably fair.

13 Q Do you think the other half, I mean, if we
14 drove down, does SEMO have similar --

15 A Well, all the academies have the same
16 curriculum for the 600-hour curriculum.

17 Q So if he didn't have it, the others wouldn't
18 have had it either?

19 A Unless they somehow included -- basically,
20 the objectives and course outline and everything is
21 pretty much the same. It is POST approved. There
22 can be some changes between the academies, but it
23 has to be approved by the POST. But, for the most
24 part, it is the same training.

25 Q Let's go to five. Policies, procedures and

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1 customs with respect to the Fourth Amendment.

2 Officer Peters suggested significant amount of
3 training. How would you describe?

4 A We certainly try. The Fourth Amendment is
5 something that we are involved in on a day-to-day
6 basis so, therefore, we will try to do more training
7 in that area as we can.

8 So, in addition to the academy training,
9 we have inservice trainings that we provide that
10 again we have a subject matter expert. Typically,
11 they host these on a regional basis that we will
12 send officers to.

13 We have training tips. Training tips are
14 methods of writing down information documenting and
15 getting them read at roll calls. When something
16 changes or is modified, we have memorandums and
17 e-mails that we use and sometimes just general
18 discussions about it

19 Q Roll call, I mean, that is --

20 A Every morning, every evening. We have
21 12-hour shifts, so it is 7:00 a.m. and 7:00 p.m.
22 When a new platoon is coming in reporting for duty,
23 they have roll call for 15 minutes and we pass down
24 a log of things that have been happening in the past
25 few days, warrant information, extra patrol areas,

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1 that sort of thing.

2 Q So this is an opportunity to put Fourth
3 Amendment issues out there?

4 A Yes.

5 Q First Amendment did not get anything put out
6 at roll call?

7 A Not that I can recall.

8 Q But that would be the forum. It's not
9 limited?

10 A It's a good way to communicate it.

11 Q I guess this topic five is Fourth Amendment
12 with respect to probable cause. Can you speak
13 specifically about the policies and procedures with
14 respect to the probable cause?

15 A Well, again, this kind of goes back to the
16 training, what probable cause is and what
17 constitutes probable cause. Much of that we rely on
18 the academies to instill in the officers is the
19 difference in understanding what probable cause is
20 within that Fourth Amendment.

21 If there are cases that, for example, the
22 case that and, this is going back years ago, but
23 when the court decided that smelling marijuana
24 smoke, if you could show that you knew what
25 marijuana smoke smelled like, that that was probable

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1 cause to search a vehicle. We would put something
2 out there.

3 There is a recent Supreme Court case.
4 This is probable cause under these circumstances.
5 If a dog sniffs and makes a positive hit. So those
6 kind of updates. Is that what you're asking?

7 Q Yes, that's good. So the Supreme Court case
8 is a good example?

9 A Yes.

10 Q So the constitutionality of these things
11 matters? I mean, to the extent that a law would be
12 conflicting with the Supreme Court?

13 A Sure.

14 Q It is something that would matter to you
15 all?

16 A Sure.

17 Q Your position is is that your department
18 officers, if there's a law on the book that is
19 unconstitutional, they do not have the ability to
20 enforce that law?

21 A Yeah. I mean, if that specific law has been
22 declared unconstitutional, then yeah. And in a
23 sense that's what I'm kind of waiting for here from
24 our city attorney as well for this ordinance.

25 Q See, that's an important distinction though.

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1 You're saying that -- so the Missouri statute has
2 not been declared unconstitutional for flag burning?

3 A As I understand it, it is not.

4 Q Is your position that your department can
5 enforce it?

6 A Here's the way, we obviously -- the county
7 prosecuting attorney is not going to prosecute based
8 upon circumstances that we had, so if we had an
9 incident like Officer Peters said, what we would do
10 is refer it to him. We wouldn't take anyone into
11 custody and make the arrest immediately, but we
12 would make a report of it, send it to the prosecutor
13 and say, okay, is there anything different about
14 this that you feel is constitutional? If so, then
15 you can issue the warrant, let us know or issue a
16 court summons or whatever the process would be, but
17 as far as knowing for sure.

18 I mean, if we were told by our prosecuting
19 attorney or by someone with authority that this law
20 is unconstitutional, then we would not enforce it,
21 if that's what you're asking.

22 Q I think I heard you. If the Judge says
23 Missouri Statute 578.095 is declared
24 unconstitutional, you would not enforce it?

25 A Right.

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1 Q And I heard your reference to, I think your
2 words were something along the lines of the
3 situation we have now because there is a lawsuit
4 pending?

5 A Right.

6 Q But prior to a lawsuit. You have a law that
7 is not declared unconstitutional. I mean, 578 has
8 never been declared unconstitutional, that law. But
9 flag burning is protected. The Supreme Court has
10 said flag desecration cannot be criminalized.

11 A Yes.

12 Q So the state law is inconsistent with the
13 Supreme Court.

14 A Right.

15 Q What do you do? What do you tell your
16 officers? Our law is inconsistent, but it's never
17 been declared unconstitutional. What is your
18 position for the city on the ability to enforce it?

19 A That we don't enforce it. I mean, again, I
20 would confer with both the county prosecuting
21 attorney, Morley Swingle, as well as our city
22 attorney, Eric Cunningham. As long as they are in
23 agreement with that, then our information would be
24 don't enforce it.

25 Q Prior to an incident or do we need to wait

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1 for an incident and a lawsuit to happen?

2 A If we were aware of it prior to the
3 incident, it would be prior to the incident.

4 Q So you had an inkling and you remembered not
5 the exact date or the citation for the flag burning
6 law, the Supreme Court's flag burning was
7 authorized, you testified earlier --

8 A Yeah. Once this was brought to my
9 attention, I thought, oh, yeah, I think I do
10 remember something, but, yeah, just vaguely. I
11 mean, it wasn't something on the top of my mind or
12 something that I had thought about.

13 Q I do want to talk about you said you are
14 waiting now for word from the city regarding the
15 ordinance?

16 A Right.

17 Q What do you need to learn from them that
18 would say enforce or not enforce?

19 A I don't understand.

20 Q If you say you know now that the Supreme
21 Court says it is unconstitutional to ban someone's
22 desecration of the flag, what information are you
23 standing by for from the city?

24 A Well, when I talked to the city attorney, he
25 thought there was another case out there somewhere.

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1 He wanted to do some additional research. I'm just
2 waiting for him.

3 Q The reason I'm asking is I want to make
4 sure. You had said if the law itself was declared
5 unconstitutional, the 578.095 and your Ordinance 17,
6 this ordinance, and I want to broaden it. I mean,
7 these laws are not declared unconstitutional but are
8 unconstitutional. Do you understand?

9 A I think I understand what you're saying.

10 Q Do you understand the distinction? I mean,
11 I want to make sure you do understand.

12 A Okay.

13 Q Do you know what I mean by that? I mean,
14 that a law could be on the books --

15 A Right.

16 Q -- not declared unconstitutional, but would
17 be?

18 A Right. Yeah, I do understand. I will go
19 back to an example I kind of mentioned earlier,
20 Tennessee versus Gardner that changed the whole use
21 of force, police officers using deadly force.

22 Missouri had and may still have the law on
23 the books that allows police officers to kill a
24 fleeing felon. Well, you know, we changed our
25 policy immediately, but that was obviously brought

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1 to our attention and it was clear that it was
2 unconstitutional. Even though legally you could do
3 it, it was unconstitutional, but yet it changed our
4 way of doing business back in the mid-'80s when that
5 Supreme Court decision was passed. So if it's
6 there, we know about it, and it's clearly
7 unconstitutional, we can change our policies.

8 Q And when you said it was legal to kill a
9 fleeing felon, you just meant that it would be
10 consistent with the statute?

11 A Exactly, yes.

12 Q It wouldn't be legal?

13 A Legal from a criminal statute.

14 Q But you wouldn't be protected by pointing to
15 the statute?

16 A Right.

17 Q Same thing here in this case?

18 A It appears that it's moving in that
19 direction.

20 Q So the next topic which is topic six, which
21 is Fourth Amendment search and seizure about the
22 policies, practices and procedures and customs.

23 Can you talk a little bit about the city
24 and the department's policies?

25 A Well, very similar. We kind of rely on the

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1 institutional knowledge from the academy that any
2 changes or modifications. You know, recently there
3 was a Supreme Court case dealing with a search
4 incident to arrest in a vehicle and searching the
5 interior of that vehicle. We put that information
6 out when there are those kinds of changes.

7 Every two or three years we usually have
8 somebody that does a search and seizure training,
9 either Morley Swingle or Dr. Michael Brown who is in
10 charge of the regional academy. They provide search
11 and seizure training for us and they will update our
12 officers on that as well.

13 Q And you would use the roll call as well if
14 it was appropriate and timely?

15 A Yes.

16 Q On the search and seizure, if there is a
17 training tip or memo or even on those other things
18 that I've just described, you know, the probable
19 cause, who is the one that drafts them?

20 A It's different. We usually assign an
21 officer who maybe works in that area. We do have a
22 training officer and sometimes that officer will do
23 the training tips. Our assistant chief,
24 lieutenants, it just kind of depends on who may be
25 more the subject matter expert than someone else or

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1 who it seems to fall in line with. It is not one
2 individual.

3 Q If I said today there is a search and
4 seizure case that just happened in the Supreme
5 Court, do you have someone in mind who you would
6 assign it to?

7 A Yes, probably my assistant chief.

8 Q Is he considered your expert in that or
9 that's his subject area?

10 A Well, yeah. We have our investigation
11 supervisor or patrol commander. All of them are
12 pretty astute and knowledgeable of the criminal law.

13 Q And who would do probable -- if I had a
14 probable cause case, who would you assign that to?

15 A Probably one of those same individuals.

16 Q How about a First Amendment case, who would
17 do that?

18 A Probably one of the same individuals.

19 Q When those folks are writing these memos,
20 Prosecutor Swingle, does he have a role in that?

21 A Yes, more consulting than anything. If we
22 have a question, if it's not clear, often times we
23 will take the information that we're getting from
24 either from a law enforcement periodical or a
25 bulletin and many times it's simply repeating that

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1 information, but if there is clarification that is
2 needed, we will often times consult with Morley.

3 Q Does he have approval authority? I mean,
4 does he initial it and say I validate, this law is a
5 good law or --

6 A I'm not sure I understand what you're
7 asking. He does not sign off on anything.
8 Typically, the way it goes is, we will call him on
9 the phone or often times he comes in in the morning
10 picking up our warrant applications and we will just
11 say, Morley, do you have a minute, we want to run
12 something by you. He'll sit down and we'll discuss
13 it and then we use that information.

14 Occasionally, he will send us something, a
15 letter outlining some item that has changed and we
16 will simply attach that to the training tip. So in
17 those cases he has literally signed off on it, but
18 for the most part, no, we are getting information
19 from him and then incorporating that in our training
20 tip.

21 Q How often -- does your department more
22 interact with the county prosecutor for the criminal
23 things that you do or is it with the city?

24 A Typically, but not always. Sometimes it
25 depends. If it is specifically related to the city

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1 or a city ordinance, we will often times get
2 information from our city prosecuting attorney,
3 sometimes from our city attorney.

4 I recall one dealing with open records
5 that our city attorney dealt with, but mostly for
6 the criminal and search and seizure, we normally
7 consult with our county prosecuting attorney.

8 Q Number seven, final topic. Fifth Amendment
9 Due Process. How much training and policies? Do
10 you have written policies on due process?

11 A Can you be a little more clear? I mean, I
12 understand what due process is, but are you
13 referring to anything in particular?

14 Q How this case proceeded might be an example.
15 An officer reports, sees something, writes up a
16 probable cause statement.

17 A In my perspective, that was the proper way
18 to do it. I mean, we are taking an incident and
19 we're dealing with the opinion of a prosecuting
20 attorney as well as a Judge before we take any kind
21 of action. So that, I mean, I don't know if we can
22 do anything better than that.

23 Q There is no opinion sought. I mean, the
24 probable cause statement was written and acted upon?

25 A By the prosecutor.

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1 Q By a police officer with two years
2 experience, not a bad thing?

3 A Right.

4 Q And writes up a complaint against someone
5 with a law that is unconstitutional?

6 MR. SPRADLING: Let me pose an objection.
7 First of all, it's not a complaint. It's a probable
8 cause statement.

9 Second, the facts, the statute as written,
10 if it involves speech, it is probably
11 unconstitutional, but flag burning may not be, as
12 applied it may be unconstitutional in this case, but
13 flag burning may not be unconstitutional as a matter
14 of law because of it may not involve speech, so, I
15 will object to the form of the question on the basis
16 that you're saying it's an unconstitutional law
17 because, A, it hasn't been declared
18 unconstitutional. It may be unconstitutionally
19 applied in this case.

20 Q (By Mr. Doty) The probable cause statement
21 as written up. You don't have any training in First
22 Amendment other than what they may have received and
23 he was speaking --

24 A And I hate to say we don't have any training
25 in First Amendment because you do go through the

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1 amendments and you talk about what they are, so
2 likely, there is some training. I just can't put my
3 finger on any that we may have had.

4 Q But you just talked about how this is
5 playing out. I mean, it's clearly something with
6 speech here. I mean, he declared he was angry with
7 the government. Have you declared a First Amendment
8 expert in your department and can say, let's review
9 this before we send this? In other words, the
10 mechanisms. It went from a second year police
11 officer to the prosecuting attorney, not seeking his
12 opinion, but seeking his signature, at least,
13 notifying him. There wasn't an opinion asked, was
14 there?

15 A Every time, the way I look at it, every time
16 you send a probable cause statement or affidavit to
17 the prosecutor, you're asking their opinion because
18 they then look at the facts and determine whether,
19 number one, the law, in fact, was violated and
20 whether the elements are there to indicate that such
21 is the case, so they examine that. They look at it
22 and determine whether or not a criminal charge has
23 occurred. They then issue the warrant and go to the
24 Judge and the Judge examines it and goes through the
25 same process and signs it.

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1 So in a sense that is asking for their
2 opinion. That is the way I see it because we don't
3 always get warrants.

4 Q But to the extent that you said your
5 position is, if a law is unconstitutional, your
6 officers are not supposed to enforce it. They will
7 not send a probable cause statement to someone,
8 right, because there is no probable cause?

9 A If it gets to the point that some authority,
10 whether it be the county prosecuting attorney or
11 city attorney tells us that this is no longer
12 constitutional, don't enforce this under any
13 circumstance then, yes, we will.

14 Q So you need that? You won't independently
15 make that choice. You won't independently say it's
16 unconstitutional. Your officers are out there and
17 they absolutely know what they're doing is
18 unconstitutional?

19 A Right. I think if citizens were to ask me
20 why we are not enforcing the law, I need to have a
21 greater or higher authority that I can say -- and
22 typically, the prosecutor is the person that makes
23 the call whether or not they are going to charge a
24 crime. And if they are saying that they are not
25 going to charge this particular crime, then I think

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1 that's sufficient for me to tell my officers not to
2 enforce this law.

3 Q So it is necessary. It is necessary that
4 the lawyer tell you that it's unconstitutional?

5 A It certainly is a comfort level. I wouldn't
6 make that decision without consulting with an
7 attorney, without consulting with our prosecuting
8 attorney and our city attorney.

9 Q With respect to the due process, they sent--
10 your officers communicate or transmit this probable
11 cause statement. The warrant that is produced from
12 that, is that all the prosecutor's office? Does the
13 police department play any role in the warrant?

14 A I'm not sure I understand. We send it to
15 the prosecutor's office and then they make a
16 decision whether to issue a warrant based on that.

17 Q And who writes up the warrant?

18 A They do.

19 Q They write it up?

20 A Yes.

21 Q And then you execute it?

22 A Yeah, they send it back. And if they issue
23 the warrant, they will fax it back to us or let us
24 know when the warrant was signed, but then we are
25 pretty much done with it.

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1 Q Except to execute that?

2 A Right, if they issue the warrant.

3 Q When you transmit the probable cause
4 statement to Prosecutor Swingle, what else goes with
5 it? I mean, is it evidence, is it pictures? Does
6 he see the file?

7 A Yes. In fact, they want as much information
8 as they can get. So we try to include everything
9 that we have, whether we take pictures of the
10 evidence, any statements that we have, the incident
11 report itself. Anything at all that will help
12 substantiate that that criminal violation occurred.

13 Q So the pictures that we have and Officer
14 Peters' incident report, those things would have
15 been included?

16 A Yes, in any case. I mean, they want to see
17 that.

18 Q I appreciate your time. Thanks so much.

19 MR. SPRADLING: We will waive.
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CERTIFICATE OF REPORTER

I, Linda DeBisschop, Certified Shorthand Reporter, Notary Public within and for the State of Missouri, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

Notary Public within and for
the State of Missouri